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In The

Supreme Court of the United States

October Term, 1968

No. 425

MONROE AUTO EQUIPMENT CO., Petitioner

V.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.):
Section 2(5) 4
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MONROE AUTO EQUIPMENT CO., Petitioner

V.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Monroe Auto Equipment Company prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on April 29, 1968.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, pp. 15-16) is reported at 392 F.2d 559. The findings of fact, conclusions of law, and order of the National Labor Relations Board (App. B, infra, pp. 17-55) are reported at 159 N.L.R.B. 613.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 29, 1968 (App. A, infra pp. 15-16).

By order dated July 22, 1968, Mr. Justice White extended the time for filing a petition for writ of certiorari to, and including, August 21, 1968. The jurisdiction of the court is invoked under 28 U.S.C., Section 1254(1), and Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 160(e).

QUESTIONS PRESENTED

The question involved in this case is whether the substantial evidence rule as interpreted by the case of *Universal Camera Corp. v. N.L.R.B.*, 340 U. S. 474 (1951) has been misinterpreted by the United States Court of Appeals for the Fifth Circuit. Is there to be drawn a distinction in the application of the substantial evidence rule between issues determined by conflicting evidence drawn from the record as a whole and issues determined by unreasonable inferences drawn from uncontroverted evidence? Involved herein is the question of whether the status of union observership is to be considered presumptive of improper employer motivation for the purpose of finding a violation of Section 8(a)(3) of the Act.

STATUTES INVOLVED

Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. 158(a)(3) and (1), provide in pertinent part as follows:

> Sec. 8(a). It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in exercise of the rights guaranteed in Section 7;
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of

employment to encourage or discourage membership in any labor organization; . . .

Being relevant to Section 8(a)(1), Section 7 of the Act reads:

> Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

Section 10(e) of the Act, 29 U.S.C. 160(e), provides in pertinent part as follows:

> (e) The Board shall have power to petition any court of appeals of the United States, . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order. . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

STATEMENT OF THE CASE

The petitioner, Monroe Auto Equipment Company, (hereinafter referred to as the Company) is a Michigan corporation with an office and plant located in Hartwell, Georgia and is engaged in the manufacture, sale, and distribution of automotive shock absorbers and related products. During the year preceding the issuance of the complaint, the Company sold and shipped products valued in excess of $50,000 from its plant in Hartwell, Georgia, directly to customers outside the state of Georgia (Tr. 306).

The Company admits that it has been, and is, engaged in interstate commerce within the meaning of Section 2(6) and (7) of the Act (Tr. 306).

The Company also admits that the Union, U.A.W., is a labor organization within the meaning of Section 2(5) of the Act (Tr. 307).

The Board found, adopting the recommendations of the Trial Examiner, that the Company had discriminatorily transferred one Hoke Smith to less desirable employment and thereafter constructively discharged said employee. The Board also found that the Company had discriminatorily suspended one Charles Cleveland. The Company was found in violation of Section 8(a)(3) and (1) of the Act regarding both employees.

Hoke Smith had been an employee of the Company for four years prior to his alleged discharge. His work history, by his own testimony, was one of many changes with little or no notice. From May, 1960 to July-August, 1964 Hoke Smith held the following jobs with the Company:

Bushing Machine—short time—two weeks
Tallow tank—about two years
Henry and Wright operator (overnight notice)
Pulling shocks—off line (1960)
Night watchman—3 months March 1963
Straightening up pallets and picking up leaky shocks
Henry and Wright (2 days)
Oct. 63 to May-June 1964, eight months, pulling shocks on "off line."
Henry and Wright operator
"A Line" operator, putting nuts and springs on shocks
June 27, 1964 put on pulling shocks on the main line (Tr. 99-108).

Smith worked on the "A line" for approximately eight days, through Friday, July 24, 1964 (Tr. 328, 105). This job consisted of putting springs, washers, and nuts on shock absorbers (Tr. 328). On Monday, July 27, 1964 the Company transferred Smith to the job of "pulling shocks" on the "main line" (Tr. 328), a job he had held before. The election had been held July 23 and 24, 1964, and Hoke Smith, along with Charles Cleveland, had served as union observers. Smith had supported the union and solicited other employees (Tr. 90-91), but there is absolutely no evidence that the Company knew or should have known about Smith's union sympathies other than the fact that he was a union observer. This applies to Cleveland as well.

On July 31 Smith became ill and was sent home (Tr. 332, 93-94). He finally reported back for work on August 24, 1964. At that time Smith was put back on the main line pulling shocks. Smith objected, saying he needed more help and said that he wasn't going back to work for that reason (Tr. 332-333, 95-96). The foreman replied that if he couldn't pull them he wasn't needed (Tr. 333, 96). Smith said, you don't need me, and was subsequently discharged for failure to work, or insubordination.

Cleveland had been an employee of the Company for seven years as a paint operator (Tr. 337, 22). He was given a seven day suspension because he failed to clean up the area around his paint machine as instructed (Tr. 338, 258-259, 257). Cleveland had swept up a pile of trash but when the shift ended he left it in the middle of the floor (Tr. 339, 29-30, 45).

As with Hoke Smith, Cleveland was a union observer at the election (Tr. 338, 34, 25). It was said that he had solicited employees but there is absolutely no evi-

dence to show that the Company had any knowledge of these solicitations or should have known since some six to seven hundred employees were involved.

The Board found that because the two employees acted as election observers the Company was in violation of Section 8(a)(3) and (1) of the Act, when it discriminatorily transferred Hoke Smith on July 27, 1964 to the job of pulling shocks and constructively discharged him on August 24, 1964, by instructing him to leave if he could not perform the work; and discriminatorily suspended Charles Cleveland for one week on August 11, 1964, on the basis that he had failed to clean his work area.

The United States Court of Appeals for the Fifth Circuit enforced the Board's order.

REASONS FOR GRANTING THE WRIT

I. The Substantial Evidence Rule As Interpreted By the Case of Universal Camera Corp. v. N.L.R.B. Has Been Misinterpreted By The United States Court of Appeals for the Fifth Circuit So As to Invoke the Power of Supervision of The Supreme Court of The United States.

Seventeen years ago the case of *Universal Camera Corp.* v. *N.L.R.B.*, 340 U. S. 474 (1951), set out the criteria and elements for judicial review of an order of the National Labor Relations Board. The court below relied on that decision when it said:

> . . . but we are not at liberty to displace the Board's choice if it is between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us de novo. 392 F. 2d at 560.

In the instant case a question of conflicting views is not presented. This is a case where the Board has drawn unreasonable inferences from uncontroverted evidence. This fact raises an important distinction. See *N.L.R.B.* v. *Suniland Furniture Co.*, 387 F.2d 123 (5th Cir. 1967). Ours is not a case of record conflicts, but a case where the record merely is void of an essential element of an 8(a)(3) violation. The Fifth Circuit certainly had a duty, pursuant to *Universal Camera*, to scour the record as a whole to determine whether or not there was substantial evidence to support an 8(a)(3) violation. Had it done so, it would have found that Hoke Smith was transferred to another position three days after the election and thereafter discharged because he refused to do his assigned work, that Charles Cleveland was suspended for seven days because he failed to clean up his work area, and that Hoke Smith and Charles Cleveland were union observers at the recognition election conducted prior to the alleged discrimination. But this does not establish an 8(a)(3) violation. The question of whether an employer has violated Section 8(a)(3) of the Act normally turns on an employer's motivation. Absent conduct which is inherently destructive of employee rights, proof of anti-union motivation is needed to establish a violation if the employer has come forward with evidence of legitimate and substantial business justification for its action. This statement of the law has been well established by this court in *Textile Workers Union of America* v. *Darlington Mfg. Co.*, 380 U.S. 263 (1965); *American Ship Bldg. Co.* v. *N.L.R.B.*, 380 U. S. 300 (1965), and *N.L.R.B.* v. *Great Dane Trailers*, 388 U. S. 26 (1967). Obviously, to establish an improper employer motivation the discriminatees must be engaged in some type of union activity to such an extent so as to give rise to an inference that such was the real reason for the discrimination In this case the Board concluded:

> The job of pulling shocks was considerably more vigorous than the job from which Hoke Smith was transferred, particularly in view of his age. The transfer occurred almost immediately after Smith served as observer for the union at the election. Respondent contends that it had no knowledge of Smith's union activities. It is the conclusion of the Trial Examiner that the Respondent must reasonably have inferred or suspected that Smith was active on behalf of the union, or a strong adherent thereof, from the fact that he was selected by the union as one of its observers. (Tr. 334).

Being repetitious, the Petitioner urges that a distinction be drawn between conflicting evidence which brings into application the substantial evidence rule, and drawing unreasonable inferences from the record as a whole when there is lacking an essential element of an 8(a)(3) violation. There is no contradiction in this case. The only evidence of union activity submitted to support an 8(a)(3) violation was the fact that the two employees were union observers at a recognition election conducted by the NLRB (Tr. 334, 338).[1] Petitioner admits that the alleged discrimination took place shortly after the recognition election at which they served, and submits that there was substantial business justification for the employer's conduct. However, union activity alone, prior to discharge, is not sufficient to support a finding of discrimination where the discharge is punishment for insubordination. *N.L.R.B. v.*

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[1] There is evidence in the record showing that the employees, Smith and Cleveland, had solicited other employees for Union membership (Tr. 90-91, 75), but there is absolutely no evidence to prove that the employer knew or should have known anything about this other union activity. It is a well established rule that in the absence of knowledge of union activity discharge of employees is not unlawful. *N.L.R.B. v. Holcombe Armature*, 325 F.2d 508 (5th Cir. 1963); *West Point Mfg. Co., Wellington Mill Division v. N.L.R.B.*, 330 F.2d 579 (4th Cir. 1964), *cert. den.* 379 U.S. 832 (1964); *Schwab Mfg. Co. v. N.L.R.B.*, 297 F.2d 864 (5th Cir. 1962).

Montgomery Ward & Co., 157 F.2d 486 (8th Cir. 1946); *Howard Aero, Inc.*, 119 N.L.R.B. 1531 (1958). However, the inference has been drawn from the evidence that these employees were discharged because of their union adherence. The Board has failed to sustain its burden of proof that the *cause* of the discharge was their union activity. The only evidence on the record, which is uncontroverted, is that these two employees were union observers and that the employer's conduct occurred soon after the election. The inference drawn by the Board is unreasonable, and an essential element of an 8(a)(3) violation is lacking. The inference drawn by the Board also presents the issue, does union observership at an election constitute union activity within the purport of Section 8(a)(3)?

Generally, the job of observer is to act as checker at the voting place and in the counting of ballots. Observers assist in the identification of voters, challenge voters, and basically assist the Board agent. Their presence at an election is a privilege, not a right.

Jat Transportation Corp., 131 N.L.R.B. 122 (1961). The N.L.R.B. Official Form, Form N.L.R.B. 722 (2-59) "Instructions to Election Observers," sets out an observer's duties, what to do and what not to do, and negatives any assumption that a union observer must be union oriented or prejudiced in favor of the union. For example, Instruction 10 of "Things To Do" states, "Wear your observer badge at all times during the conduct of the election." And pursuant to "Things *Not* To Do":

1. Give any help to any voter. Only an agent of the Board can assist the voter.
2. Electioneer any place during the hours of the election.

> 7. Wear any indication of the organization which you represent except the observer badge provided by the Board. . . .

Finally, the instruction form states:

> As an official representative of your organization, you should enter upon this task with a fair and open mind. Conduct yourself so that no one can find fault with your actions during the election. You are here to see that the election is conducted in a fair and impartial manner, so that each eligible voter has a fair and equal chance to express himself freely and in secret.

The entire tone of these "Instructions" is impartiality and fairness. This is hardly the type of union activity which would lead to discriminatory conduct.

There is to be no union label stuck on an observer. It would be contradictory to the concept that recognition elections are to be conducted under "laboratory conditions" to so hold. Furthermore, supervisors are not allowed to be observers for the company, and so called company observers may not be closely identified with the employer. *Watkins Brick Co.*, 107 N.L.R.B. No. 110 (1953). Obviously, this is done to prevent any coercive atmosphere at the election. Yet, it has been held that the presence of a union official as an observer does not warrant setting aside an election where his conduct is exemplary. *Shoreline Enterprises of America* v. *N.L.R.B.*, 262 F.2d 933 (5th Cir. 1959); *U.S. Gypsum Co.*, 80 N.L.R.B. 1205 (1948); *Dallas Packing Co.*, 116 N.L.R.B. 1609 (1956). Thus, there is a coercive inference drawn with employer observers since supervisors aren't allowed to be observers, yet the same is not true of a union observer since union officials are allowed to be observers. Again, it is clear that a union observer simply does not carry the stigma of union activity.

Other cases dealing with the discharge of union representatives prove helpful to our case. The N.L.R.B. has held that when a shop steward was discharged the fact that he was a shop steward did not in and of itself sustain the union's and Board's position that he was fired for union activity rather than for insubordination. *Pathe Laboratories, Inc.*, 141 N.L.R.B. 1290 (1963); *Administrative Decision* of N.L.R.B. General Counsel, Case No. F-21 (1957). The analogy between shop steward and union observer is helpful because that status alone was not enough to presume discharge due to union activity. In the instant case the N.L.R.B. and the court below have presumed union activity from the observership status. To illustrate, the Trial Examiner concluded and the Board agreed that "the Respondent must have reasonably inferred or suspected that Smith was active on behalf of the union as one of its observers." (Tr. 334). From reading the brief of the N.L.R.B., the Trial Examiner's recommendations, and the Board's Order, it is apparent that the issue litigated was whether or not the transfer of Hoke Smith involved a transfer to more arduous work. Evidence of union activity as the employer's motivation for discrimination is non-existent. Obviously, it was presumed that if Smith was given more arduous work then certainly he was discriminatorily transferred because he had been a union observer. The Petitioner asserts that observership status alone cannot carry the stigma of union activity sufficient to uphold an 8(a)(3) violation. Thus without a presumption of union activity the case lacks an essential element of an 8(a)(3) violation. The distinction, between a case involving conflicting evidence as to an employee's union activity and a case involving uncontradicted evidence of an employee's union activity from which unreasonable inferences are drawn, becomes extremely relevant.

A recent case demonstrates the workability of the distinction urged herein. In *N.L.R.B.* v. *Suniland Furniture Co., supra,* the Fifth Circuit held that the N.L.R.B. erred in finding an 8(a)(3) violation. In *Suniland,* the discharged employee, Moore, actively solicited support for the union. Moore's reaction to a strongly anti-union employee was that "he would have to follow suit" if the union won the election. Thereafter, Moore was fired. The Board interpreted Moore's statement to mean that if the union won the election it would be the bargaining agent for all employees. The Fifth Circuit disagreed stating that the question was not the usual one of whether or not the Board's conclusions based on disputed facts are supported by substantial evidence, but whether "the inferences drawn by the Board from the uncontroverted facts in this case are reasonable ones." The court then went on to draw its own inferences from the undisputed facts and found that in a right-to-work state Moore's statements were illegal and unprotected and not "non-threatening" as the Board found.

The fact that the Fifth Circuit decided *Suniland* as well as the instant case raises an interesting point. It becomes obvious that the Circuits must be made aware of the distinction urged today and enunciated in *Suniland.* Its application is obviously non-existent or sporadic simply because the Circuits feel bound by the Board's conclusions. The considerable discretion with which the Board has been entrusted is well recognized, but it is proper to observe that with discretion goes responsibility. *N.L.R.B.* v. *Bonnie Enterprises, Inc.,* 341 F.2d 712, 714 (4th Cir. 1965). Thus the rule must be made clear by this Court which is why we urge this Court to order certiorari.

This distinction is vitally important to labor law today. The number of unfair labor charges that come to the Courts of Appeal for enforcement each year, and involve an application of *Universal Camera*, is staggering. The trend of Board decisions has been markedly pro-union, and, as noted by the Eighth Circuit:

> We have the impression that the Board of late has tended to overstretch on this type of issue and that, in the light of *Universal Camera*, foundation of much greater substance is required than the isolated statement presented here. *Dierks Forests, Inc.* v. *N.L.R.B.*, 385 F.2d 48, 52 (8th Cir. 1967).

The Board's practice of late has been increasingly disturbing. The federal circuit courts bend over backwards in an effort to respect the limits of review imposed upon them by the Act and *Universal Camera*. These courts frequently enforce Board orders when it is clear, as in this case, that, given a freehand, they would vacate them. Petro, *Congressional* v. *Labor Board Policies*, The Freeman, vol. 18, No. 7 (July 1968). Year after year numerous circuit court decisions contain the following observation in one form or another:

> . . . we have no hesitancy in saying that were we the fact finders we would have difficulty finding support for the charges of unfair labor practices. *N.L.R.B.* v. *Witbeck*, 382 F.2d 574 (6th Cir. 1967).

See also: *Int. Tel. & Tel.* v. *N.L.R.B.*, 382 F.2d 366 (3rd Cir. 1967); *N.L.R.B.* v. *Plymouth Cordage Co.*, 381 F.2d 710 (5th Cir. 1967); *N.L.R.B.* v. *Elco Corp.*, 378 F.2d 62 (9th Cir. 1967).

Universal Camera was decided seventeen years ago. The practice of labor law has been refined tremendously and now needs a further refining of the guidelines to be followed. The substantial evidence rule is vague and needs added interpretation to give it proper effect. Distinctions such as urged today need to be enunciated

so that it is clear what the function of the court is when it is asked to enforce an order of the Board.

The distinction urged herein is as important as the Court's recent holding in *Great Dane Trailers, supra.* That case enunciated the need for the employer to prove substantial business justification for the alleged discrimination. The rule of law to be urged in the instant case would force the Board to produce substantial evidence of union activity relating to the discharge from which it could be reasonably inferred that employee discrimination occurred. The importance of this type of guideline is clear; that is, many unfair labor charges, filed merely to harass the employer, can be summarily dismissed. It is essential that the Court adopt rules of law which lead to encouraging the discovery and prosecution of valid discrimination charges and to discourage the wasteful litigation which results from an unfounded accusation. It is this end which is sought by this petition for certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

Copies mailed to Solicitor General and General Counsel as per Certificate of Service on file.

Appendix A

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 24681

NATIONAL LABOR RELATIONS BOARD, Petitioner,
versus
MONROE AUTO EQUIPMENT COMPANY, Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, (Georgia Case)

(April 4, 1968.)

Before BROWN, Chief Judge, and AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: The Board has petitioned this Court, pursuant to Section 10(e) of the National Labor Relations Act (29 U.S.C. § 151 et seq.), for enforcement of its order wherein it found that respondent committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act at its Hartwell, Georgia, factory in that it discriminatorily transferred to less desirable employment, and thereafter constructively discharged, employee Hoke H. Smith and discriminatorily suspended employee Charles Cleveland.

The Board adopted the trial examiner's findings. The examiner credited the testimony of Hoke Smith as opposed to contradictory testimony as to whether his employment was more arduous than previous employment and as to whether more difficult employment resulted from Smith's union activities or his suspected union

activities. The examiner found also, after conflicting testimony, that Cleveland's suspension was pretextual and in reprisal for his adherence to the union. Both Smith and Cleveland had acted as observers for the union at the election held by the Board in the plant.

There is considerable testimony in this case, pro and con, on the issue of the alleged unfair labor practices. Though the Board's evidence is not as strong as in some cases where we have enforced its orders, we are unable to say that the examiner's findings, adopted by the Board, are not supported by substantial evidence. *Cf. Avondale Shipyards, Inc.* v. *N.L.R.B.*, 5 Cir., 1968, ... F. 2d . . . . Numerous credibility choices were made by the examiner and we are usually bound by such determinations, *Nabors* v *N.L.R.B.*, 5 Cir., 1963, 323 F. 2d 686; *N.L.R.B.* v. *Waycross Sportswear, Inc.*, 5 Cir., 1968, ... F. 2d . . . , though in a proper case the Court may decline to follow the action of an examiner in crediting and discrediting testimony even though the Board has adopted the examiner's findings *N.L.R.B.* v. *Elias Brothers Big Boy, Inc.*, 6 Cir., 1964, 327 F. 2d 421, 426. We are not barred from setting aside the Board's decision if we cannot conscientiously find that the evidence supporting it is substantial, but we are not at liberty to displace the Board's choice if it is between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us de novo. *N.L.R.B.* v. *Certain-Teed Products Corp.*, 5 Cir., 1968, 387 F. 2d 639; *N.L.R.B.* v. *Camco, Inc.*, 5 Cir., 1966, 369 F. 2d 125, 127. Considering the record as a whole, we conclude there is substantial evidence to support the Board's findings of discrimination against Smith and Cleveland in violation of Section 8(a)(3) and (1) of the Act. See *Avondale Shipyards, Inc.* v. N.L.R.B., *supra.*

ENFORCED.

APPENDIX B

159 N.L.R.B. No. 65

D-8978
Hartwell, Ga.

UNITED STATES OF AMERICA, BEFORE THE NATIONAL LABOR RELATIONS BOARD

MONROE AUTO EQUIPMENT CO., AND INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (U.A.W.)

DECISION AND ORDER

(Number Omitted)

On March 18, 1966, Trial Examiner Stanley Gilbert issued his decision in the above-entitled proceeding, finding that Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that Respondent had not engaged in other unfair labor practices alleged in the complaint and recommended dismissal of those allegations. Thereafter, the General Counsel, Charging Party, and Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, and the en-

tire record in these cases, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, with the modification noted below.

We do not agree with the Trial Examiner that a press release issued by Respondent shortly after the petition was filed on July 1, 1965, and read over radio station WKLY, contained a statement which, when read in light of all the surrounding circumstances, constituted a threat of economic reprisal should the Union become the employees' collective-bargaining representative. On the contrary, we find that Respondent's statement was in the permissible area of fair comment and did not violate Section 8(a) (1) of the Act.

159 NLRB No. 65.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified below, and hereby orders that the Respondent, Monroe Auto Equipment Company, Hartwell, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as hereinafter modified:

1. Delete paragraph 1(a) of the Trial Examiner's Recommended Order and renumber paragraphs 1(b) and (c) as 1(a) and (b) respectively. In new paragraph 1(b), delete the words "In any other manner" and substitute the words, "In any like or related manner . . ."

2. The Appendix attached to the Trial Examiner's Decision shall be amended by deleting therefrom the first and second paragraphs. In addition, in the fourth paragraph delete the words "in any other manner" and

substitute the words "in any like or related manner . . ."

Dated, Washington, D.C. June 17, 1966

Frank W. McCulloch,
Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member
NATIONAL LABOR
RELATIONS BOARD

(SEAL)

TXD 149-66
Hartwell, Ga.

TRIAL EXAMINER'S DECISION

(Number and Title Omitted)

Statement of the Case

On August 18, 1964, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) AFL-CIO, hereinafter referred to as the Union or UAW, filed a charge in Case No. 10-CA-5835 alleging that the Monroe Auto Equipment Company, hereinafter referred to as the Respondent or Company, engaged in conduct violative of Section 8(a)(1) and (3) of the Act. On December 30, 1964, the Union filed a charge in Case No. 10-CA-5952 alleging that the Company through its agents the "Hart County Betterment Association" and the Association's president, Tommy Meyers, engaged in conduct violative of Section 8(a)(1) of the Act. On June 11, 1965, the charge in Case No. 10-CA-5952 was amended by deleting the references to the parties alleged to be the

Company's agents and restating the conduct by which the Company allegedly violated Section 8(a)(1) of the Act. On June 18, 1965, the Regional Director for the Tenth Region issued an order consolidating said cases and also issued the complaint in this proceeding. Said complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act. By its answer, as amended at the start of the hearing in this proceeding, Respondent denies that it committed the unfair labor practices alleged in the complaint.

Pursuant to notice, a hearing was held in Hartwell, Georgia, on August 18, 19, and 20, 1965, before the undersigned, duly designated as Trial Examiner. All parties appeared and were given full opportunity to offer relevant and competent evidence. Briefs were received from General Counsel, Charging Party, and Respondent within the time designated therefor.

Upon the entire record in this case and upon observation of the witnesses as they testified, I make the following:

Findings of Fact

I. The Business of Respondent

Respondent, a Michigan corporation with an office and plant in Hartwell, Georgia, is engaged at said location in the manufacture, sale, and distribution of automotive shock absorbers and related products. During the year preceding the issuance of the complaint herein, a representative period, Respondent sold and shipped products valued in excess of $50,000 from its plant in Hartwell, Georgia, directly to customers outside the State of Georgia.

As is admitted by Respondent, it is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

As is admitted by Respondent, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

Background and Summary of Undisputed Facts

In the middle of 1963 the Union started a campaign to organize Respondent's employees. Beginning in October, 1963, *The Hartwell Sun*, a weekly newspaper in Hartwell, Georgia, with general circulation in said locality, published a number of editorials and articles, as well as an extra edition, referring to the organizational efforts of the Union and to the election on July 23 and 24, 1964, in which said organizational efforts culminated. Said extra edition which was published on July 23, 1964, contained the following notice: "This EXTRA is a publication of The Hartwell Sun and was published at the request of, and paid for by, citizens of Hart County who desire a healthy industrial climate for the betterment of this area and its people." Tommy Myers, as head of a loosely knit committee, arranged for the publication of the extra edition and an advertisement which appeared in *The Anderson Independent*, a newspaper published in Anderson, South Carolina, with general circulation in the area where Respondent's employees live. In addition, Myers had printed and distributed literature bearing on the election. Also, prior to the election, Radio Station WKLY, serving the Hartwell area, transmitted statements and news reports with respect to the election. One of said transmissions, on or about July 10, 1964, included a verbatim reading of a press release issued by Respondent. On July 1, 1964, the Union filed a petition in Case No. 10-RC-5690 for certification as the collec-

tive-bargaining representative of a unit of Respondent's employees. A consent election was conducted by the Board on July 23 and 24, 1964, which the Union lost. The Union filed timely objections and the Board set aside said election. A second election has not been held pending this proceeding.

The Issues

1. Whether, by failing to disavow certain statements which appeared in *The Hartwell Sun,* which were contained in the advertisement and literature arranged for and distributed by Myers' committee and which were transmitted by Radio Station WKLY, Respondent violated Section 8(a)(1) of the Act.

2. Whether, by its press release which was broadcast over Radio Station WKLY on or about June 10, 1964, Respondent violated Section 8(a)(1) of the Act.

3. Whether, by the conduct of Respondent's foreman, John W. Osley, and other action of Respondent with respect to a mock funeral held in the town square on July 24, 1964, apparently to celebrate the Union's loss of the election, Respondent violated Section 8(a)(1) of the Act.

4. Whether, by the conduct of Respondent's foreman, Cleo B. Sanders, at said mock funeral, Respondent violated Section 8(a)(1) of the Act.

5. Whether Respondent laid off or discharged its employee Guy C. Alewine, in violation of Section 8(a)(3) and (1) of the Act.

6. Whether Respondent constructively discharged its employee, Hoke H. Smith, in violation of Section 8(a)(3) and (1) of the Act.

7. Whether, by suspending its employee, Charles Cleveland, from on or about August 11, 1964, until on

or about August 18, 1964, Respondent violated Section 8(a)(3) and (1) of the Act.

1. The failure to disavow

It is the contention of the General Counsel and the Charging Party that various statements and other material which appeared in *The Hartwell Sun*, which were contained in the advertisement and literature arranged for and distributed by Myers' committee, and which were broadcast by Radio Station WKLY constituted threats that the plant would be closed or other economic reprisals would be taken, if the employees elected to have the Union as their collective-bargaining representative, and that, by failing to disavow such threats, Respondent violated Section 8(a)(1) of the Act. It was neither alleged nor contended that *The Hartwell Sun*, Myers' committee, or Radio Station WKLY acted as an agent of the Respondent within the meaning of the Act.[1] Furthermore, the record discloses that the parties therefore agreed and the Trial Examiner understood that the question of agency was not an issue to be litigated herein. The argument of General Counsel and Charging Party appears to be that, even though the aforesaid statements and material (which, it is found, constituted threats of economic reprisal should the employees elect to have the Union represent them) cannot be attributed to the Respondent or its agent, that it may be presumed that Respondent had knowledge of the statements and material,

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[1] In Section 2 of the Act which contains definitions, there are the following provisions:

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly . . . .

(13) "In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

that, by remaining silent, Respondent benefited therefrom, and that, by failing to disavow the threats, it violated the Act. While it appears appropriate to infer that Respondent did have knowledge of such statements and material in view of the smallness of the community, and that it benefited therefrom, said inferences are of no aid to the argument that Respondent's failure to disavow the threats expressed constituted a violation of the Act.

In his brief General Counsel cites editorials by N. S. Hayden, editor of *The Hartwell Sun*, which were published on October 24, 1963, November 14, 1963, and November 21, 1963. General counsel states, in his brief, that, while he does not urge that any violation of the Act can be based upon said editorials because of the 6-month limitation provision of Section 10(b) of the Act, they "serve, however, to show Hayden's intense opposition to the Union and his determination to insure its defeat at the Respondent's plant." This opposition and determination on the part of Hayden are disclosed not only by the aforesaid editorials, but also by subsequent editorials published within the "10(b) period," as well as by Hayden's candid admission thereof in his testimony.

General Counsel also cites the publication on November 21, 1963, of an interview in *The Hartwell Sun* with Respondent's plant manager, Charles Gordon, concerning the Union's organizational efforts. Again, the General Counsel does not contend that the interview can be relied upon as a basis for finding a violation of the Act, because of Section 10(b), but argues that it "served to show" that the newspaper "was used as a vehicle through which the Respondent expressed its policies concerning the Union to its employees and to the citizens of Hartwell and Hart County." The same argument (of use as a "vehicle" of communication)

is apparently made by General Counsel with respect to Myers' committee and Radio Station WKLY, based on the fact that the extra edition of July 23, 1964, which was "requested and paid for" by Myers' committee, contained what the General Counsel characterized as a "communication from the Respondent to its employees," and that Respondent furnished a press release to WKLY which was read over the air. It is not clear whether this argument is an attempt on the part of the General Counsel to raise obliquely the issue of agency by using as a synonym, "vehicle of communication." Clearly the granting of an interview to a newspaper or the issuance of a press release to a radio station by a corporation, absent evidence of any other relationship or affirmative action, does not establish either the newspaper or the radio station as the corporation's agent in communicating with its employees. As for the so-called "communication" from Respondent contained in the extra edition, it constituted a reprint of a pamphlet in the form of questions and answers which the Respondent had previously distributed to its employees. There is no showing or basis for inferring that it had been furnished by the Respondent for inclusion in the extra edition. Therefore, it is concluded that there is no merit in General Counsel's argument on this point. The matter of the Union's attempt to organize the Respondent's plant was of general interest to the community and, therefore, it cannot be said that the interview, the radio broadcast, or the reprint of the questions and answers established the newspaper, the committee and the station as Respondent's vehicles of communication with its employees.

Within the 6-month period preceding the charge filed in Case No. 10-CA-5835 there were a number of editorials published in *The Sun*, radio broadcasts over Station WKLY, and pieces of literature arranged for

and distributed by Myers' committee (including the extra edition of *The Sun* on July 23, 1964) which unmistakably threatened that Respondent's plant would be closed, or employment there adversely affected, if the employees selected the Union as their collective-bargaining representative. There is no need to set forth the details of the exhibits received in evidence upon which this conclusion is based, for, not only are the threats apparent, but also there is no contention upon the part of the Respondent that such a conclusion would be inappropriate. Respondent's defense is simply that, there being no proof that such exhibits emanated from it or any agent of it, they do not constitute evidence of a violation of the Act by Respondent and, therefore Respondent's failure to disavow the threats expressed in said exhibits does not constitute interference, restraint, and coercion by it of its employees within the meaning of Section 8(a)(1) of the Act. Neither the General Counsel nor the Charging Party cited any authority for finding that a failure to disavow threats made by a person or an entity other than the employer or its agents is a violation of the Act, absent a showing of the employer's ratification of the threats.[2] In order to find that an employer has violated the Act, it is unambiguously provided therein that it must be conduct engaged in by the employer or its agent. The Board has stated in both the unfair labor practice proceedings and representation proceedings, that an employer is not responsible for conduct which would have constituted an unfair labor practice had it been that of the employer or his agent, if an agency is not established or ratification, express or implied, has not been proved. *Byrds*

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[2] Indeed, in their briefs, the General Counsel indicated and the Charging Party candidly admitted that there is no precedent for such a finding.

Manufacturing Corp., 140 NLRB 147, 155;[3] *Monarch Rubber Co., Inc.*, 121 NLRB 81, 83.

In *Bibb Manufacturing Company*, 82 NLRB 338, 340-341, the Board held the employer responsible for threats published in a "newspaper" upon a finding that the employer did more than passively enjoy the benefits of the antiunion statements and, therefore, in effect, should have disavowed the threats. There is nothing in the record herein upon which a conclusion can be based that the Respondent did any more than passively enjoy the conduct of *The Sun*, Myers' committee, and Station WKLY. It did not ratify the threats, and neither the General Counsel nor the Charging Party contends that there was ratification.[4] The Board will set aside an election because of the coercive atmosphere engendered by "editors and other . . . third parties," even though there is no showing that they were acting as agents of the employer. *Universal Manufacturing Corporation of Mississippi*, 156 NLRB No. 132. However, the Charging Party argues that, in the circumstances of this case, the setting aside of the first election is of little value. It points out that, if an election were held in the future in the Respondent's plant, *The Hartwell Sun*, Myers' committee, and Radio Station WKLY will probably repeat the conduct

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[3] The Board adopted the findings, conclusions and recommendations of the Trial Examiner. Among his conclusions were the following:

> The responsibility of an employer for the conduct of an outsider is not established only when agency is established. The outsider must be acting under the direction or control of the employer or, if the conduct is originally unauthorized, it must be ratified expressly or impliedly. *It is not sufficient (to establish the employer's responsibility) to show that the employer enjoys the benefits of the outsider's actions.*[20] (Emphasis supplied.)

[20] *N.L.R.B. v. Cherokee Hosiery Mills*, 196 F.2d 286, 290 (C.A. 5).

[4] Although it is found herein below that Respondent did violate Section 8(a)(1) of the Act by a press release which was read over Station WKLY, it was not urged, nor is it deemed, that this constituted ratification by Respondent of the editorials, literature of Myers' committee, or other WKLY broadcasts.

they engaged in prior to the first election which, again, the Respondent can passively enjoy, and the Charging Party implores that a remedy be designed to counteract the effect of such repetition. As desirable as it seems to be to require the Respondent to disavow future coercive conduct of *The Hartwell Sun,* Myers' committee, and Radio Station WKLY,[5] the Trial Examiner is forced to conclude that there is nothing in the Act which would permit him to recommend such a remedy in this proceeding. However, it would appear that the reassurance[6] to the employees provided in the Remedy and the Notice to remedy the threat of Respondent found hereinbelow to be violative of Section 8(a)(1) of the Act should offset to a large extent the effect of future threats by "outsiders."

2. Respondent's press release

Shortly after the Union filed its aforesaid petition on July 1, 1964, a press release issued by the Respondent was read over the air in a broadcast by Radio Station WKLY. The press release contained the following:

> Mr. McIntyre said that he felt like the employees and townspeople understood and appreciated that the $20,000,000 spent by Monroe in payroll in Hartwell, Hart County and surrounding counties was evidence of its confidence in the people of Hart County and surrounding counties. He said that he had no doubt that employees would vote to continue its fine relations and employment in the area.

The last sentence in the above-quoted statement, considered in the context in which it appears, clearly implies that, if the employees voted to have the Union

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[5] To furnish an atmosphere sufficiently devoid of coercion as to permit employees to express their free choice in a second election.

[6] That it will not inflict economic reprisals upon its employees should they select the Union as their collective-bargaining representative.

represent them, the effect would be a discontinuance of Respondent's "fine relations and employment in the area." This can only be reasonably construed to mean that a majority vote for the Union would adversely affect Respondent's employment. It is concluded that this constituted an implied threat of economic reprisal should the Union become the employees' collective-bargaining representative and constituted interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act.

3. The mock funeral

Apparently in celebration of the Union's loss of the election, a mock funeral was staged in the Hartwell town square, mid-day on June 24, 1964. There is no showing in the record that the Respondent played any part in its instigation, planning, or staging. It is alleged in the complaint that the Respondent violated Section 8(a)(1) of the Act by the conduct of its foreman, John Osley, in that he "encouraged . . . employees to attend" the mock funeral and by the fact that Respondent "paid . . . employees who attended" it.

In support of the allegation that Osley encouraged employees to attend the mock funeral, General Counsel relies on the testimony of employees Ernest Beebe, Marvin Bryant, and Donald Alewine. According to Beebe's testimony he (Beebe) asked Osley if he were going to the funeral, and, when Osley replied in the affirmative, Beebe requested a "ride" with him, which request was granted. Bryant testified that he heard of the funeral from Osley, who told him that he could go to it, if he wanted to do so. According to Alewine's testimony, Osley told him about the funeral shortly before the noon hour, and informed him that he could go to it, but, if he did not want to go, he did not have to do so. The record discloses that the mock fu-

neral was widely discussed by the employees throughout the plant on the morning of July 24.

The regular lunch period extended from noon to 12:30 p.m. and, it appears, that customarily there was strict observance of the time allowed for lunch. According to the testimony of all three of said employees, the production line did not start at 12:30 that day, apparently because there were not enough employees present to man the line. According to the testimony of employee Tommy Hendrix, resumption of work that day was delayed 20 or 25 minutes beyond the normal period. It appears that no employee suffered a loss of pay because of the delay in the resumption of work. When testifying, Osley stated that he could recall "no conversations" with employees regarding the funeral prior to the lunch period. He further testified that he returned to the plant at 12:30. However, he also testified that he did not hear the whistle for the resumption of work and, when questioned whether production started immediately at 12:30, he avoided a categorical answer indicating that he was not in a position to testify one way or the other.

The above outlined testimony of Beebe, Bryant, Alewine, and Hendrix is credited, inasmuch as the testimony of Osley, insofar as it contradicted their testimony, was not convincing. It does not appear that said credited testimony would support a finding that Osley encouraged employees to attend the funeral. At the most, it discloses that he informed two employees that the celebration was going to take place (which apparently was widely known and discussed among the employees that morning); told one of them that he could go to it, but did not have to, if he did not want to; and granted a request of a third employee of a ride to the celebration. The total of these facts falls far

short of an aggregate which can be characterized as "encouragement."

As for the payment by Respondent to employees for the period of 20 or 25 minutes during which resumption of work was delayed, the General Counsel contends that such action "conveyed to the employees the expression of the Respondent's approval of the Union's defeat and presented a situation from which the employees could easily conclude that they might be rewarded similarly for a future defeat of the Union." The General Counsel cites the case of *Edro Corporation,* 147 NLRB 1167, in which it was found that the employer therein violated Section 8(a)(1) of the Act by allowing a party to be held on its property to celebrate the Union's loss of an election and by paying employees for their time spent at the party. It does not appear that the cited case can be equated with the conduct of the Respondent in this proceeding. The funeral was not held on the Company's property and the employees were paid for only 20 or 25 minutes of time in which they did not work, in contrast to the *Edro Corporation* case where the employees were paid for loss of a half-day's working time. It is the considered judgment of the Trial Examiner that the failure of Respondent to deduct from employees' wages an amount corresponding to the 20 or 25 minutes lost working time was *de minimis* and could not reasonably have had the effect upon the employees which General Counsel contends.

Therefore, it is concluded that General Counsel has failed to prove by a preponderance of the evidence the allegations in the complaint that Respondent violated Section 8(a)(1) of the Act by encouraging employees to attend the funeral and by paying them for time spent at it.

4. Sanders' participation in the mock funeral

It is alleged in the complaint that Respondent by its supervisor and agent, Foreman Cleo B. Sanders, participated in the mock funeral by his pronouncement that the Union was dead and by delivering an eulogy for the Union. Sanders testified that he was present in the square at the time of the mock funeral, that he had no part in planning the funeral, that he left the plant at the start of the regular lunch hour, and returned prior to the expiration of the regular lunch hour. He further testified that shortly after he arrived at the square, "someone yelled for a coroner"; that he was the elected coroner for Hartwell; that there was a "dummy" (apparently an effigy of the Union) in the square; and that he pronounced it to be dead. Sanders' above testimony is uncontradicted and credited. General Counsel contends that Sanders' conduct "served to demonstrate to the employees Respondent's approval" of the funeral and "clearly conveyed to the employees the futility of organizational efforts at Respondent's plant." It appears that the employees present could not reasonably have considered Sanders' participation in the "funeral" as a "coroner" was intended to convey to them Respondent's position with respect to the Union. In any event, his participation could not have reasonably had the coercive effect which General Counsel contends. In view of this conclusion, it does not appear that there is any merit in General Counsel's contention as to the effect of Sanders' conduct on Respondent's employees. Therefore, it is further concluded that General Counsel has not proved by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act by the conduct of Sanders, as alleged in the complaint.

5. The alleged discrimination against Guy C. Alewine

It is alleged in the complaint that on or about June 12, 1964, Respondent laid off and thereafter failed and refused to recall Guy C. Alewine in violation of Section 8(a)(3) and (1) of the Act. In its answer as amended, Respondent alleged that Alewine was terminated on said date, but denied that such action was violative of the Act. Alewine was employed by Respondent for a period in 1959 and entered the employ of Respondent again in August 1960. In 1963, while he was working as a material handler, he, according to his testimony which is credited, became active on behalf of the Union and talked to employees during nonworking time at the plant and at their homes. According to further testimony of Alewine, which is uncontradicted and credited, he was approached in October or November of 1963 by Talmadge Dove who offered him a badge bearing the legend "no union for me"; Alewine told Dove that he would not wear it and that he would vote for the Union, at another time, Dove told him that if he did not wear the badge both of them "would get into trouble"; and on a third occasion, in November of 1963, Dove told Alewine that he would be transferred to the "oil line" if he did not "quit" his union activities.[7] It appears that there is a dispute as to whether Dove is a supervisor within the meaning of the Act. According to the testimony of Alewine, Dove responsibly directed the work of 40 employees. The testimony of Respondent's witnesses in support of its contention that Dove was not a supervisor was vague and unconvincing. Therefore, Alewine's testimony as to the duties and responsibilities of Dove is credited and it is concluded that

[7] It appears that a job on the oil line is far from as desirable as that of a material handler. These statements by Dove were prior to the "10(b) period" and are only considered as background information.

Dove was a supervisor within the meaning of the Act at the time material herein.

Alewine testified that, in February of 1964, he was told by Dove that he was wanted by Bennie Reid, general plant foreman for the third shift, in the office of Grove Dudley, the plant superintendent; that he went into Dudley's office where Reid and Foreman Rufus Barnes were present; that he asked Reid if he wanted to see him; that Reid told him "yes . . . you're fired;" that he asked Reid for the reason; that Reid refused to give him an explanation and told him that, if he wanted to, he could return the next day and "see somebody higher up"; that he Alewine, then "got mad and cussed him out and left."

Reid testified that, in January 1964, he observed Alewine "being off the job, talking to and interfering with another operator"; that he asked Alewine to come to "the office"; that he then reprimanded Alewine for his conduct; that Alewine apologized and assured him that it would not happen again; and that the next day he gave Alewine a warning slip for his said conduct. Reid further testified that subsequently, in February 1964, he observed Alewine engaging in the same conduct about which he had previously warned him and instructed Dove to send Alewine to Dudley's office; that, when Alewine came in he told Alewine that he had observed him committing the same offense he had committed in January; that Alewine "flew mad," picked up a piston-rod assembly and raised it to strike him with it; that he told Alewine that he was discharged and if he was not satisfied with the decision he could come back the next day and "talk it over with anybody that he would like . . ."; that Alewine called him what may be characterized as vile names and threatened to kill him; and that he told Alewine to punch out and "come back tomorrow." Reid further testified that he did not

give Alewine a discharge slip at that time, but sent the discharge slip through channels. On cross-examination, Reid admitted that he had intended to discharge Alewine when he summoned him to Dudley's office. There is little substantial conflict in the testimony of Alewine and Reid as to the incident. Reid supplied details as to Alewine's conduct which precipitated the incident and Alewine's actions when he "got mad," which testimony was not contradicted. The testimony of Reid is credited with respect to the incident and the events which precipitated it.

The next day there was a meeting in the office of Charles Gordon, Respondent's general manager. There is no substantial variation in the testimony of the witnesses with respect to what then occurred. The facts may be summarized as follows: Alewine went into Gordon's office where there were various supervisors present besides Gordon;[8] Gordon reviewed the matter of Reid's decision to discharge Alewine; Alewine apologized for losing his temper; and Gordon reversed the decision to discharge Alewine and reduced the disciplinary action to a 7-day layoff.

Summarized hereinbelow is the uncontradicted and credited testimony of Alewine. Before Alewine returned to work at the conclusion of his suspension, he asked Dudley whether he could get a transfer to another job, so as to "get out from under the supervision of Bennie Reid." Dudley told him that he did not think there was any chance of it, that he and Reid would "just have to get along together." When Alewine started to leave, Dudley told him that Gordon wanted to see him. He then went to see Gordon who offered him the job of budget clerk. When he told Gordon that he did not know whether he wanted to

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[8] It is noted that Dove was also present.

take the job, or whether he was capable of handling it, Gordon told him that he would have ample time to train for it and that he did not think he would have trouble with the job. Gordon then told him he did not have to make up his mind at that time, that he could return to his regular job the next day and gave him approximately 10 days to decide whether to take the budge clerk job. Alewine returned to his regular job the following day and, at the end of the time which he was given to make up his mind, he informed Gordon that he was willing to accept the budget clerk job. At that point Gordon stated to him, "The Union will have a lot to say about this, you being fired, and now me putting you back and giving you a better job." Alewine commenced his job as a clerk toward the end of February and received an increase in pay approximately 4 or 5 weeks thereafter. As a clerk Alewine worked under the supervision of Eugene Cleveland. Alewine testified that "on more than one occasion" Cleveland talked to him about "being off" his job. On one such occasion, after he gave Cleveland an explanation, Cleveland said to him that he was "doing a good job," and that somebody had reported that he was off his job. On the morning of June 13, 1964, he and another clerk were informed by Cleveland that they were discharged as of the end of their shift on that day. The other clerk had been employed approximately a month or a month and a half. Alewine asked Cleveland why he was being discharged in view of the fact that he had "plant seniority over all of the factory clerks . . . and job seniority over half of them," and whether it was because of his work. Cleveland informed him that he had orders to discharge him "from higher up." The record discloses that Alewine did have seniority over many of the clerks who were retained in Respondent's employ.

That night Alewine went to Gordon's home and talked to him about the action that was taken in regard to his employment. Both Alewine and Gordon testified as to their conversation. Alewine testified that he asked Gordon whether he was fired or laid off and that Gordon replied that he was laid off, but "the best thing he could do" was to find another job. Gordon testified that he told him that he was discharged and to look for another job. This variation in their testimony appears to be of no significance.

According to the credited testimony of Gordon, around June of 1964, he received orders from the head office in Monroe, Michigan, to reduce his work force and cut down on production from 17,500 shock absorbers a day to 12,500. Accordingly, the work force was reduced from approximately 900 employees to 700. The work force remained at substantially the same reduced figure up until the time of the hearing. According to the further credited testimony of Gordon, the number of employees on hourly salary was controlled by him and the number of salaried employees was controlled by the head office in Monroe. However, the selection of those who were to be retained and those to be laid off or terminated was under his control. It also appears from his credited testimony that the established policy was to terminate or lay off the hourly group of employees on a seniority basis and that with respect to the salaried employees (which included the clerks) those temporarily employed "go first and after that the selection is based upon performance."[9] Gordon testified that it was he who ordered the discharge of Alewine, that he selected him for termination be-

[9] It is deemed that this credited testimony explains the uncontradicted and credited testimony of Alewine that shortly before June 13 a notice was posted announcing that there would be a reduction in force and that it would be on a seniority basis.

cause he had complaints from Alewine's supervisor, Cleveland, that Alewine was not "staying within his area," that he had personally observed Alewine out of his area, and that he had instructed Cleveland to tell Alewine to stay within his area, but that thereafter Cleveland reported that he still had trouble with Alewine on that score. The above testimony of Gordon as to his reason for his selecting Alewine for discharge is credited. Not only was Gordon an impressive witness but also Alewine corroborated his testimony with respect to complaints about his being out of his area. As above noted, Alewine testified that "on more than one occasion" Cleveland spoke to him about it.

The record supports a finding that Respondent's management was aware of Alewine's prounion attitude, based upon Alewine's uncontradicted and credited testimony of statements made to him by Dove and of Gordon's speculation as to what the Union's reaction would be to his (Gordon's) action in giving him the better job of budget clerk. Nevertheless, it is concluded that General Counsel did not prove by a preponderance of evidence that the selection of Alewine for termination in the extensive reduction in force was discriminatorily motivated. It would appear that, had Gordon desired to be rid of Alewine because of his prounion attitude, he could very well have sustained Reid's discharge of Alewine instead of reducing the disciplinary action to a 7-day suspension and accepting Alewine's apology for his conduct in threatening Reid. Shortly thereafter he gave Alewine, who desired to get away from working under Reid, a job in another department which apparently was considered better than the one Alewine had had. There is no evidence that thereafter the Respondent had any knowledge or suspicion of union activity on the part of Alewine, and it appears that, as a salaried employee, he was not within the

unit which the Union was seeking to represent. The reduction in force was for economic reasons and occurred prior to the filing by the Union of its petition for certification. Therefore, there was nothing suspicious about the timing, nor is there any contention to that effect. (There is no contention that the selection for the reduction in force of any of the other employees, approximately 200 in number, was discriminatorily motivated.) Consequently it is the considered judgment of the Trial Examiner that it would not be appropriate to find that the selection of Alewine in the reduction in force was discriminatorily motivated.

6. The constructive discharge of Hoke Smith

It is alleged in the complaint that on or about July 27, 1964, Respondent discriminatorily discharged Hoke H. Smith. Respondent, in its amended answer, denied that Smith was terminated on July 27, and alleged that he quit his employment on August 24, 1964. The charge as to the discrimination against Smith was filed on August 18, 1964. The undisputed facts are that Smith's regular job, as of July 24, was on the "A line" putting such things as springs, washers, and nuts on shock absorbers. The election was held on July 23 and 24 and Smith served as a union observer. The last day that Smith worked on the A line was on Friday, July 24. On the following Monday, July 27, shortly after he started working on the A line, Smith was transferred to the job of "pulling shocks" on the "main line." On July 31, 1964, about the middle of his shift, which was from 4:30 p.m. until 1 a.m., Smith became ill and was permitted to go home. A few days later he was hospitalized and remained in the hospital for 9 days. He reported back to work on August 24, but left that day without doing any work. The circumstances in which he left will be considered hereinbelow.

It is apparently the contention of the General Counsel and the Charging Party that Smith was constructively discharged in violation of the Act for the following reasons: that the job of pulling shocks was much more arduous than that of working on the A line; that Respondent transferred Smith to pulling shocks on July 27, despite the fact that he was 58 years old, and insisted that he continue on the job of pulling shocks on August 24, despite his age and recent illness, in order to cause him to refuse to do the job or to become ill again; and that Respondent's discriminatory motive is further demonstrated by various other factors which are considered hereinbelow.

Hoke began his employment with the Company in May of 1960 and worked at various jobs starting with a short time on a "bushing machine," then about 2 years on the "tallow tank" and thereafter on "running the Henry & Wright." While working on that machine he applied for and was given a job as night watchman until the job was abolished. He was then transferred to the job of "straightening up shocks." From there he was transferred to the "off line" and then put back on the "Henry & Wright" until the plant-wide layoff in June, 1964. About that time Smith cut his hand on a piece of scrap steel and could only work with one hand, so he was given the job of running the "burr roller and the tumbler" for 2 or 3 weeks. Thereafter, when he was again able to use his injured hand, he was transferred to the A line either shortly before or after the plant-wide vacation of 2 weeks which started on July 1.[10] Therefore, it appears that Hoke Smith worked on the A line approximately 8 working days before he was transferred to pulling shocks.

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[10] The supervisor in charge of the A line, James E. Smith, testified that Hoke Smith came into his department either just before or just after said vacation.

The job of "pulling shocks" consists of extending the shock absorbers by pulling them down as they ride on a moving line, so that they can be painted. The following are descriptions of the process by General Counsel's witness, Ernest Beebe, and Respondent's witness, Lander Downs. Beebe testified as follows:

> Q. (By Mr. Brandon): Tell me the process by which you extend the shock, please, Mr. Beebe.
> A. Well, if they have a loop on the bottom, we got a hook we can put our feet in, you know, extend them out. Or, if they have got a stem, they have made us a gadget over there on the off line, a little old nut we can stick up on them and pull them out. On the main line, we don't have time, it's moving too fast, so they have to pull them out with their hands.

Downs testified as follows:

> TRIAL EXAMINER: How do you pull the shocks?
>
> THE WITNESS: Pull it down with a hook. I have —I put the hook in my foot and you got to have a hook on top of that I hook in. The shocks that has loops on 'em, I pull them out with a hook, what we call a hook, or a shock-pulling hook. And some, that you pull with your hand, that you don't use a shock-pulling stick for.

A considerable amount of testimony was elicited by all of the parties with respect to the physical effort required to pull shocks to demonstrate, on the one hand, that it was an arduous job for a 58-year-old man, and, on the other hand, that it was not. It is the opinion of the Trial Examiner, based upon the testimony of said witnesses as to the process, that the job of pulling shocks required a considerable amount of physical effort and was a great deal more arduous than the job on the A line.

It appears that on occasions Smith pulled shocks on the "off line" and "main line" prior to the election. However, it further appears that Smith only did this for comparatively short intervals to furnish additional help. In addition, it appears that the working conditions on the main line were rigorous not only because of the physical effort but also because of the heat that was engendered in the area due to the process of preheating the shocks. In the absence of medical testimony, however, it does not appear appropriate for the Trial Examiner to conclude that the heat and physical effort of pulling shocks caused Hoke Smith to become ill in the middle of his shift on July 31. When General Manager Bennie Reid passed by, Smith told Reid of his illness and Reid instructed him to wait until his supervisor, James E. Smith (also referred to as Ed Smith), came in. When Ed Smith came in, Hoke Smith reported his illness to him, and he told Hoke Smith to "check out" and go home. A few days later Hoke Smith was hospitalized and remained in the hospital for 9 days.

When Hoke Smith returned to work on August 24, he reported early to Ed Smith. Hoke Smith's testimony as to what then occurred is as follows:

> I said, "where do you want me to go tonight?" and he said "Up there pulling shocks" and I said, "Ed, are we going to have any help?" and he says, "You'll have to see Grover about that. Do you want to see him?" and I said, "Yeah." I had time before the whistle blowed, and I went up and talked to Mr. Grover Dudley and I said, "Grover, are we going to have any help on that line when it's full?" and he said, "I'm not allowed but two men" and I said "Mr. Dudley, I've been back there helping pull when there was three all the time in the daytime, and three to five when the line's loaded." and I said "Two men cannot pull them." I said, "I spent nine days in the hospital and I'm

not going back there on account of that." And he says "It's up to your Foreman." He never did say I could have help or I couldn't have help. He says, "It's up to your Foreman, where he works you."

I went back down there and I told Ed Smith what he said. And I said, "Ed, I'll go up there and pull the shocks, as many as I can and let the rest go by." He says, "If you can't pull them, I don't need you." I said, "Well, Ed, I'll pull what I can, now. I'm willing to pull that many, but I can't keep up with it when the line's loaded." He said, "If you can't pull them, I don't need you." I said, "Well, you don't need me."

So, he carried me to the office and wrote out a note. And I didn't know what it was; if I had, I wouldn't have accepted it. I'd have went back there and pulled shocks. Later on, they mailed it to me and it said I refused to the job assigned to. I didn't refuse to do it; I said I couldn't do it by myself, and they didn't need me.

Ed Smith testified as to the incident and there is no substantial contradiction[11] between his testimony and the above quoted testimony of Hoke Smith. The above quoted testimony of Hoke Smith is credited.

Respondent points out, in its brief, that the complaint alleged the discharge to have occurred on July 27 and that the charge upon which it was based was filed on August 18. Respondent further points out that Hoke Smith's employment was not terminated until August 24, after both the date alleged in the complaint and the date of filing of the charge, and argues that the charge should, therefore, be dismissed. It appears that this argument is of little merit. The constructive

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[11] Although, at first, Ed Smith testified that Hoke Smith stated he "would not pull shocks," he later alternated between "could not" and "would not."

discharge on August 24 was fully litigated and it is sufficiently related to the allegation in the complaint and the charge so that the Respondent cannot seriously contend that it was misled. It is the conclusion of the Trial Examiner that Smith was discriminatorily transferred on July 27 and constructively discharged on August 24 in violation of Section 8(a)(3) and (1) of the Act. This conclusion is predicated on the factors set forth hereinbelow.

The job of pulling shocks was considerably more rigorous than the job from which Hoke Smith was transferred, particularly in view of Smith's age. The transfer occurred almost immediately after Smith served as observer for the Union at the election. Respondent contends that it had no knowledge of Smith's union activities. It is the conclusion of the Trial Examiner that the Respondent must have reasonably inferred or suspected that Smith was active on behalf of the Union, or a strong adherent thereof, from the fact that he was selected by the Union as one of its observers. Respondent elicited testimony to show that the reason Smith was transferred from his job to that of pulling shocks was because he was of unsatisfactory performance on the "A line." This testimony was from Ed Smith, foreman of the A line, and Tommy Brown, who apparently worked under Smith and, to some extent, supervised the work on the A line including that of Hoke Smith. Brown's testimony was not convincing. Brown, who testified that he was a leader on the A line, was extremely vague and frequently indicated that his recollection was poor as to the events which preceded Hoke Smith's transfer. Ed Smith's testimony was not convincing. According to his testimony, Hoke Smith only worked on the A line for approximately 8 days. He further testified that he received five or six complaints from Tommy Brown about Hoke Smith's performance

in that short interval. However, Hoke Smith testified without contradiction that he received no reprimands for his performance during the time that he worked on the A line. Furthermore, Ed Smith did not impress the Trial Examiner as a candid witness when questioned as to the relative difficulty of pulling shocks. For this reason and from his observation of them while they were testifying, the Trial Examiner does not credit their testimony that Hoke Smith's work performance on the A line was unsatisfactory and that it was Hoke Smith's unsatisfactory work performance which motivated his transfer to pulling shocks.

To continue with the factors upon which the aforesaid conclusions of Respondent's violations of Section 8(a)(3) and (1) of the Act are predicated it is noted that Smith replaced at the job of pulling shocks, Weyman Risner who, Hoke Smith testified without contradiction, was a considerably younger man in his "30's." Ed Smith testified that he sent Risner to "putting up parts for the welders" and that he did not place Hoke Smith at that job because he did not have time to train him for it. In his testimony, Ed Smith attempted to demonstrate the difficulty of the job to which he transferred Risner. This testimony of the knowledge and physical effort it requires was unconvincing and failed to establish said difficulty. It is also noted that Risner returned to the job of pulling shocks during Hoke Smith's absence between July 31 and August 24 which would indicate that Risner could have been kept at said job. A further example of Ed Smith's unreliability as a witness is demonstrated by his testimony as to Hoke Smith's work performance on the A line on July 30 where Smith worked temporarily for 4½ hours. Ed Smith first testified that Hoke Smith did not perform satisfactorily at that time. However, after further questioning, he admitted that he did not "specifically re-

member" that Hoke Smith's performance was unsatisfactory on that day. As to the refusal to give Hoke Smith additional help and insisting that he pull every other shock on August 24, it is noted that a witness for Respondent, Lander Downs, who worked for considerable periods at pulling shocks, testified that he was always given extra help when he asked for it and that whenever two were working on the line, instead of each man pulling every other shock when they become too difficult, they laid aside those they were unable to pull until they got help. The record indicates that prior to the election the Respondent followed the practice of being cooperative, with Hoke Smith, as well as with other employees, in granting requests for transfers to other jobs and giving them an easier job when appropriate. The record further discloses that Dudley and Smith were aware on August 24 that Hoke Smith had just returned from an illness for which he had been hospitalized. Management did not follow its customary practice of cooperativeness with and consideration for its employees but instead insisted that he return to a job which they must have realized, because of the physical effort it required and the heat in the area, was too demanding on a 58-year-old man who had just reported back to work after a long and apparently severe illness. It is the conclusion of the Trial Examiner that this callous treatment, in contrast to its customary practice, was an attempt on the part of Respondent to induce Hoke Smith to quit, or to attempt to perform a job which would have overtaxed his strength, because of his union activities, or suspected union activities. It is further concluded that thereby Respondent constructively discharged Hoke Smith on August 24, 1964, in violation of Section 8(a)(3) and (1) of the Act. As indicated above, it is also concluded that Respondent discriminatorily transferred Hoke Smith to the job of pulling shocks on July 27, 1964.

7. The 7-day suspension of Charles Cleveland

Charles Cleveland, who at the time of the hearing had been in the employ of Respondent almost 7 years, was given a 7-day suspension by Respondent from August 11 to August 18, 1964. It is alleged that his suspension was discriminatorily motivated. At the time of his suspension Cleveland had the job of paint operator under the supervision of Respondent's foreman, John Osley. Osley testified that, on August 10 about an hour before quitting time, he asked Cleveland "to clean up," and at quitting time he "saw that it hadn't been done." He further testified that the next morning he went to see his supervisor, Grover Dudley, and told him that Cleveland had been instructed to clean up his area but had failed to do it, and that he asked for and received permission to give Cleveland a 7-day suspension. He then wrote out a "reprimand" which indicated that Cleveland was laid off for 7 days and stated as reason therefor, "has not kept area around painter cleaned as instructed." Cleveland was given the notice of his suspension when he reported for work at lunch time that day, August 11.

Respondent contends that the suspension was not discriminatorily motivated and, as one of the reasons in support thereof, argues that there is no showing that Respondent had knowledge of Cleveland's attitude toward the Union. However, there appears to be little merit in this reason, in view of the fact that, shortly before the suspension, Cleveland acted as an observer for the Union at the election held on July 23 and 24. It is concluded that Respondent must have reasonably inferred from his selection by the Union as an observer that Cleveland was either active on behalf of the Union or a strong union adherent.

Respondent further argues in support of its contention that the suspension was not discriminatorily mo-

tivated as follows: "And it was not denied at all that he left a pile of trash in the middle of the floor when only a moment would have been required to put it in a trash can. This could have angered his supervisor enough to cause the suspension." Cleveland did testify that he had swept the trash into a pile but did not put the pile into a trash can, that the pile was about 3 or 4 inches wide and about one-half inch high and that he did not put the trash in the can because the whistle had blown and it was the practice to stop whatever was being done at that time. The existence of this practice was not only corroborated by other witnesses of the General Counsel but also by Osley. Osley, on the other hand, testified that he saw more than a pile of trash, that trash was "scattered in the area." Osley further testified that he did not see Cleveland with a broom in his hand. Certain of the salient features of Osley's testimony were contradicted not only by Cleveland but also by employees Ernest Beebe and Marvin Bryant, who worked in areas next to that in which Cleveland worked. All three of them testified that Osley asked them to clean up a short time before the whistle blew (varying from 2 to 3 minutes to 10 to 15 minutes prior thereto). It appears from the testimony of all of the witnesses including Osley that cleaning up was done during the last 5 minutes of the work day. It further appears that there were no standing instructions about cleaning up and that it was done upon instruction. Osley gave no explanation as to why he gave Cleveland instructions to clean up a full hour before quitting time as he testified. The Trial Examiner credits the testimony of the three employees as to when they were told to clean up the area.

It appears from the testimony of said three employees that after they received instructions to clean up, Cleveland started sweeping, Beebe picked up some papers off

the floor, and Bryant just sat down. Therefore, it is the finding of the Trial Examiner that Cleveland did sweep up the area. From his testimony, it appears that Osley was present just before quitting time and must have observed Cleveland sweeping and Bryant sitting down. However, there is no showing that any disciplinary action was taken against Bryant. The record discloses that Cleveland had never been warned about possible disciplinary action for not cleaning up his area and that no other employee has ever been disciplined for such reason. Osley attempted to show as a further reason for the disciplinary action that Cleveland had failed to clean up the painter bin. However, this appears to have been an afterthought in view of the statement on the notice of suspension.

Considering all the circumstances (including the minor nature of Cleveland's offense, if any; the discredited testimony of Osley in which he attempted to exaggerate the offense; and the credited testimony that Cleveland did comply with the instructions and only failed to complete the cleaning up in accordance with the practice of ceasing work immediately at the time the whistle blows), it is the considered judgment of the Trial Examiner that the 7-day suspension was excessive and was not motivated for disciplinary reasons. Therefore, it is concluded that the reason ascribed by Respondent for the suspension was merely pretextual, that it was in reprisal for Cleveland's adherence to the Union, and was violative of Section 8(a)(3) and (1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The unfair labor practices of the Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, above, have a close, intimate, and substantial relation

to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy

It having been found that Respondent engaged in several unfair labor practices, it will be recommended that Respondent be required to cease and desist from such unfair labor practices and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminated against Hoke H. Smith by transferring him on July 27, 1964, from his then job to a more arduous job and by constructively discharging him on August 24, 1964, it will be recommended that Respondent be ordered to offer him full reinstatement to the job he held before said discriminatory transfer, or to a substantially equivalent position, without prejudice to his seniority or other rights and privileges. It will be further recommended that Respondent make said employee whole for any loss of earnings he may have suffered because of its discrimination against him by payment of a sum equal to the amount he normally would have earned as wages from August 24, 1964, to the date an offer of reinstatement is made to him, together with interest thereon as provided below. The loss of pay should be computed in accordance with the formula and method prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and the interest, payable in accordance with *Isis Plumbing & Heating Co.*, 138 NLRB 716, should be computed at the rate of 6 percent per annum on the amount due for each calendar quarter (under the *Woolworth* formula) beginning with the end of the first calendar quarter and continuing with each succeeding calendar quarter until payment of such amount is properly made.

It having been found that Respondent discriminated against its employee Charles Cleveland by suspending him from August 11, 1964, until August 18, 1964, it will be recommended that Respondent make him whole for any loss of earnings he may have suffered because of said discrimination against him by payment of a sum equal to the amount he normally would have earned as wages during the period he was suspended.

Inasmuch as certain of the unfair labor practices committed by the Respondent are of a character striking at the root of employees' rights safeguarded by the Act, it will be further recommended that the Respondent be ordered to cease and desist from infringing in any manner upon the rights guaranteed its employees in Section 7 of the Act.

In view of the finding hereinabove of a threat by Respondent violative of Section 8(a)(1) of the Act in the circumstances of parallel threats by "outsiders," and by its violations of Section 8(a)(3) of the Act, it is deemed necessary to effectuate the policies of the Act that Respondent make clear to its employees that it will not carry out its threat.

Upon the basis of the above findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. Respondent interfered with, restrained, and coerced its employees within the meaning of Section 8 (a)(1) of the Act by threatening that, if they selected the Union as their collective-bargaining representative, the employment at Respondent's plant would be adversely affected.

2. Respondent discriminated against its employee Hoke H. Smith, in violation of Section 8(a)(3) and (1)

of the Act by transferring him on July 27, 1964, from his then job to a more arduous job and by constructively discharging him on August 24, 1964.

3. Respondent discriminated against its employee Charles Cleveland in violation of Section 8(a)(3) and (1) of the Act by suspending him from August 11 to August 18, 1964.

4. General Counsel failed to prove by a preponderance of the evidence that Respondent violated Section 8(a)(1) of the Act by the conduct alleged in paragraphs 11, 13, and 14 of the complaint.

5. General Counsel failed to prove by a preponderance of the evidence that Respondent violated Section 8(a)(3) and (1) of the Act by the conduct alleged in paragraph 15 of the complaint.

RECOMMENDED ORDER

Upon the basis of the above findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that Monroe Auto Equipment Company, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, and coercing its employees in the exercise of rights guaranteed under Section 7 of the National Labor Relations Act, as amended, by threatening that, if its employees should select the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) AFL-CIO, as their collective-bargaining representative, employment at its plant would be adversely affected.

(b) Discouraging membership in said Union, or in any other labor organization if its employees, by discriminating in regard to their hire or tenure of employment or any term or condition of employment.

(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to join, form, or assist labor organizations, including the above-named labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which it is deemed will effectuate the policies of the Act:

(a) Offer to Hoke H. Smith immediate and full reinstatement to the job he held prior to his discriminatory transfer on July 27, 1964, or to a substantially equivalent position, without prejudice to his seniority or other rights and privileges and make him whole for any loss of earnings he may have suffered as the result of Respondent's discrimination against him in constructively discharging him on August 24, 1964, as provided in the section of this Decision entitled "The Remedy."

(b) Make Charles Cleveland whole for any loss of earnings he may have suffered as a result of the discrimination against him as provided in the section of this Decision entitled "The Remedy."

(c) Notify Hoke H. Smith if presently serving in the Armed Forces of the United States, of his right to full reinstatement upon application, in accordance with the Selective Service Act and the Universal Mil-

itary Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

(d) Preserve and make available to the Board or its agents, upon request, for examination and copying, all payroll records, social security payment records, timecards, personnel records, and all other records necessary to determine the amount of backpay due under the terms of this Recommended Order.

(e) Post at its plant in Hartwell, Georgia, copies of the notice attached hereto and marked "Appendix."[12] Copies of such notice, to be furnished by the Regional Director for the Tenth Region, shall, after being signed by an authorized representative of the Respondent, be posted immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(f) Notify said Regional Director, in writing, within 20 days from the receipt of this Decision what steps the Respondent has taken to comply herewith.[13]

It is further ordered that the complaint be dismissed insofar as it relates to the unfair labor practices alleged

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[12] If these Recommendations are adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. If the Board's Order is enforced by a decree of a United States Court of Appeals, the notice will be further amended by the substitution of the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" for the words "A DECISION AND ORDER."

[13] If these Recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Tenth Region, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith."

in paragraphs 11, 13, 14, and 15 thereof.

Dated at Washington, D.C. March 18, 1966.

(Signed) STANLEY GILBERT
Stanley Gilbert
Trial Examiner

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,
v.
MONROE AUTO EQUIPMENT COMPANY,
Respondent.

No. 24881

DECREE

Before: Brown, Chief Judge, and Ainsworth & Godbold, Circuit Judges.

BY THE COURT:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Monroe Auto Equipment Company, its officers, agents, successors, and assigns on June 19, 1966. The Court heard argument of respective counsel on March 13, 1968, and has considered the briefs and transcript of record filed in this cause. On April 4, 1968, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Monroe Auto Equipment Company, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said order contained.

ENTERED: April 29, 1968

(ORIGINAL FILED—APRIL 29, 1968)

SUPREME COURT, U. S.

No. 428

Office-Supreme Court, U.S.
FILED
SEP 19 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

MONROE AUTO EQUIPMENT CO., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

[illegible],
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 425

MONROE AUTO EQUIPMENT CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. Petitioner company is engaged in the manufacture of automotive shock absorbers and related products at its plant in Hartwell, Georgia (R. 44; J.A. 23, 30).[1] In the middle of 1963, the United Auto Workers union began to organize the company's employees (R. 45; J.A. 23, 134-135). Subsequently, the union and the company agreed to a Board election (R. 46;

[1] "R" refers to volume I, Transcript of Record, and "J.A." refers to the transcript of testimony and the exhibits reproduced as a joint appendix in the court below, copies of which have been filed with this Court.

J.A. 13-14). Employees Hoke Smith and Charles Cleveland, the subjects of this unfair labor practice proceeding, were employees who had actively solicited employees to support the union, and were chosen by the union to act as its observers at the polls (R. 72; J.A. 25, 33-34, 91, 219). Shortly before the election, Smith and Cleveland met with management officials to check the voter eligibility list (J.A. 33, 25).[2]

2. On the first full working day after the election, Smith was transferred from the "A" line—where he had been working placing springs, washers and nuts on shock absorbers—to "pulling shocks" on the "main line" (R. 66, 68; J.A. 91, 103, 105, 114, 183-187, 201, 214).[3] The latter job requires considerably more physical effort than does work on the "A" line (R. 69; J.A. 70, 78, 79, 84), and is performed under conditions of extreme heat (R. 69; J.A. 136-137, 161, 92-93, 77, 109). Smith, who was 58 years old, replaced Weyman Risner, a man in his thirties, who was transferred to an easier job (R. 73-74; J.A. 97, 222-223).[4] A second employee who pulled shocks

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[2] The election was held as scheduled and the union lost. But, upon the union's objections that the company had improperly interfered with employee freedom of choice, the Board set the election aside (R. 46; J.A. 13-14).

[3] In his four years with the company, Smith had worked at various jobs (R. 67, 72; J.A. 79-90, 101-103). At one time he asked for and received a transfer to a night watchman's job which he held until it was abolished (R. 67; J.A. 102). On another occasion after he injured his hand working on a machine, he was given the job of running the burr roller and tumbler for two or three weeks (R. 67; J.A. 103, 113).

[4] Smith had occasionally done this work before, but only for short periods when extra help was needed (R. 69; J.A. 98-99, 102, 108-109).

with Smith was also in his thirties (Tr. 97, 210). Smith pulled shocks until Friday, July 31, when he became sick on the job because of the heat. He was given permission to leave early, and a few days later he entered a hospital where he was confined for nine days (R. 70; J.A. 93-95, 208-209). Risner returned to pulling shocks during much of Smith's absence (R. 74; J.A. 225-226).

When Smith returned on August 24, he was again assigned to pulling shocks with another employee (R. 70-71; J.A. 95-96, 209). He asked the plant superintendent whether he could have extra help when the line was loaded to high capacity, mentioning his recent illness and hospitalization (R. 70-71; J.A. 95-96, 209). The company had previously given employees, including Smith, easier jobs when appropriate (R. 74-75; J.A. 99, 137-138, 164; *supra*, p. 2 n. 3). The company also regularly supplied employees pulling shocks with extra help when they asked for it, and permitted the two employees working on the line to slow down until extra help arrived (R. 74; J.A. 171, 168, 175-176, 152-153, 154-155, 157-161, 169, 64, 70-78-79, 83-84, 96-99, 107-108, 183). Nevertheless, the superintendent told Smith that he was allowed only two men on the job and could not supply extra help (R. 71; J.A. 96, 210). Smith then told his foreman, who also knew of his prior illness, "I'll go up there and pull the shocks, as many as I can * * *. But I can't keep up with it when the line's loaded." The foreman said, "If you can't pull them, I don't need you", and Smith replied, "well you don't need me" (R. 71; J.A. 96, 210-211). Shortly thereafter, the

Company discharged Smith, giving as the reason that he refused an assigned job (R. 71; J.A. 97, 210).

3. Shortly before quitting time on August 10, two weeks after the election, the foreman of the painting department asked Cleveland and two other employees in that department to clean up the area in which they were working (R. 76, 77, 78; J.A. 29, 32-33, 62-63, 71, 74-75, 77-78). Cleveland, who had been with the company for seven years, took a broom and began sweeping (R. 75, 76, 77, 78; J.A. 22, 29, 33, 63, 71, 75, 77-78). But one of the other employees, Marvin Bryant, simply sat down and did nothing (R. 78; J.A. 32, 33, 48, 63, 76-77). When the quitting whistle blew, Cleveland, who had gathered a small pile of trash, stopped what he was doing and left (R. 77; J.A. 29-30, 45). To avoid paying overtime, the company has a rule that, when the quitting whistle blows, each worker should stop what he is doing and punch out (R. 77; J.A. 238, 30, 63, 77). Although the foreman was present throughout and observed what had happened, he said nothing (R. 78; J.A. 231-233, 237, 252-254, 249, 78). The next day, Cleveland was notified that he was suspended for not keeping his area "cleaned as instructed" (R. 76; J.A. 257-259). Bryant was not disciplined (R. 78; J.A. 78, 255). The company had never disciplined an employee for not completing the cleaning of his area, and Cleveland had never been warned that this was a punishable offense (R. 78; J.A. 31-32, 63, 78, 237-239).

4. On these facts, the Board found that the company transferred Smith to more arduous work and subsequently constructively discharged him, and sus-

pended Cleveland, because of their involvement with the union, thereby violating Section 8(a)(3) and (1) of the National Labor Relations Act (Pet. App. B. 17-18, 46, 49, 51-52). The Board ordered the company to cease and desist from the unfair labor practices found; to reinstate Smith to his former or a substantially equivalent position; to make him and Cleveland whole for lost wages; and to post the customary notices (Pet. App. B. 18, 50-51, 52-55). The court of appeals in a *per curiam* opinion held that the Board's findings were supported by substantial evidence and accordingly enforced its order (Pet. App. A. 15-16).

5. The only question presented by the petition is whether substantial evidence supports the Board's finding that the action taken by the company was motivated by its hostility toward the union activities of the two affected employees (see Pet. 2). The court of appeals, which has the principal responsibility for examining claims of insubstantiality of evidence, found that the record adequately supported the Board's inferences and findings. This issue warrants no re-examination by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. Nor is a different conclusion required even if, as petitioner now contends (Pet. 7), the Board's findings of discriminatory motivation were based on uncontroverted facts (but see Pet. App. A. 15-16; R. 72-74, 76-78). For the *Universal Camera* rule that a reviewing court may not "displace the Board's choice between two fairly conflicting views" (340 U.S. at 488) applies not only to basic evidentiary facts, but also to the inferences drawn from such facts. The court be-

low correctly understood that standard and reasonably applied it here (see Pet. App. A. 15-16).[5]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] The court's decision in the instant case is not in conflict with *National Labor Relations Board* v. *Suniland Furniture Co.*, 387 F. 2d 123 (C.A. 5). There the Board's finding that an employee was discriminatorily discharged was based on its determination that certain remarks made by the employee which precipitated his discharge were protected as a matter of law. The court found that the remarks were not protected, and thus concluded that there was no substantial support for the Board's unfair labor practice finding (*id.*, at 124).

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